No. 89-1046

In The

Supreme Court of the United States

October Term, 1989

JOSEPH A. FRATES, CHARLES S. HOLMES, ROBERT E. MERRICK, STAN P. DOYLE, P. PETER PRUDDEN, III, J. ANTHONY FRATES, STEPHEN I. FRATES, EQUIVEST ASSOCIATES, DOYLE & HOLMES, EQUIVEST MANAGEMENT AND FINANCIAL SERVICES, LTD., JOHN L. FARRELL, JR., ASSET MANAGEMENT, INC., MONTY H. RIAL, PERMA RESOURCES CORPORATION, PERMA MINING CORPORATION, PERMA PACIFIC, INC., CALDER & COMPANY, CHIMNEY ROCK COAL COMPANY, ENERGY CAPITAL, LTD., AZTEC, LTD., COLORADO COAL RESOURCES COMPANY AND COLORADO COAL MINING,

Petitioners,

v.

HONORABLE ZITA L. WEINSHIENK, UNITED STATES DISTRICT JUDGE, HONORABLE CHARLES E. MATHESON, UNITED STATES BANKRUPTCY JUDGE, KAISER STEEL CORPORATION AND KAISER COAL CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In a situation where (1) there is no claim of actual bias; (2) the recusal motion is based solely on the judge's judicial rulings; (3) the prior rulings exhibit no bias, unfairness, friction, or intemperance; and (4) the prior rulings do not bar or prejudge any issue of the Adversary Proceedings, did the Tenth Circuit err in denying mandamus to recuse a bankruptcy judge after concluding (based upon an objective analysis of the bankruptcy judge's prior judicial rulings) that the appearance of the judge's impartiality could not reasonably be questioned.

II. In conducting an original mandamus proceeding under 28 U.S.C. § 1651, did the Tenth Circuit err in considering new arguments and information submitted by Petitioners in the mandamus proceeding.

PARTIES

Kaiser Steel Resources, Inc. is the name of the reorganized Debtor, Kaiser Steel Corporation. Kaiser Steel Resources, Inc., Kaiser Steel Corporation and Kaiser Coal Corporation have no parent, affiliated or subsidiary corporations other than wholly owned subsidiaries. Sierra Gateway Development, Inc., State Federal Savings and Loan Association of Tulsa, Oklahoma, the Estate of Howard J. Samuels, F.C.D. Corporation and Winria Management Services are defendants in the Adversary Proceedings. In addition, the following defendants have entered into settlement agreements with Kaiser and have been severed, but not finally dismissed, from the Adversary Proceedings pending the appeal to the Tenth Circuit from the Bankruptcy Court and District Court orders approving settlement: William R. Gould, Howard P. Allen, Dr. Eustace H. Winn, Charles H. Black, Richard N. Gary, Steven A. Girard, Lloyd G. Hansen, Clifford V. Brokaw, III, Miles B. Yeagley and Dean Witter Reynolds, Inc.

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Petitioners,

v.

HONORABLE ZITA L. WEINSHIENK, UNITED STATES DISTRICT JUDGE, HONORABLE CHARLES E. MATHESON, UNITED STATES BANKRUPTCY JUDGE, KAISER STEEL CORPORATION AND KAISER COAL CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Kaiser Steel Corporation and Kaiser Coal Corporation respectfully submit this brief in opposition to Petitioners' request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

In addition to the opinions and orders cited in the Petition for Writ of Certiorari ("Petition") and reprinted in Petitioners' Appendix ("Pet. App."), the order of the District Court dated February 13, 1989 denying Petitioners' motion for leave to appeal is reprinted in the appendix to the brief in opposition ("Resp. App.") at App. 1-4.

JURISDICTION

This Court's jurisdiction was properly invoked, pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §455(a) which provides:

> Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. §157(b)(1) which provides:

> (b)(1) Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, referred under subsection (a) of this Section, and may enter appropriate orders and judgments, subject to review under Section 158 of this Title.

STATEMENT OF THE CASE

Kaiser Steel Corporation and Kaiser Coal Corporation (collectively "Kaiser") filed for bankruptcy reorganization on February 11, 1987 and February 13, 1987, respectively. Soon thereafter, Kaiser commenced two adversary proceedings to recover payments and assets fraudulently conveyed from Kaiser to Petitioners, who were Kaiser's owners, former managers and directors. *Kaiser Steel Corporation et al. v. Joseph A. Frates et al.*, Adversary Proceeding No. 87-E-135 (Bankr. D. Colo.) and *Kaiser Steel Corporation et al. v. Monty H. Rial et al.*, Adversary Proceeding No. 87-E-437 (Bankr. D. Colo.) (the "Adversary Proceedings"). These proceedings were commenced on behalf of creditors who consist primarily of Kaiser's retirees whose pension and medical benefits plans were seriously underfunded.

Contrary to statements in the Petition for Writ of Certiorari, the Adversary Proceedings do not arise out of the February 1984 leveraged buyout ("LBO") in which control of Kaiser passed from public shareholders to Petitioners.[1] Rather, the Adversary Proceedings deal solely

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[1] Kaiser has commenced separate adversary proceedings in connection with the February 1984 LBO. Kaiser did not sue Petitioners in those separate adversary proceedings and those proceedings are not pending before Judge Matheson. Both Petitioners and Kaiser were sued in 1983 in a California state court action which sought to enjoin the February 1984 LBO. *Citron v. Kaiser Steel et al.* (Cal. Sup. Ct., No. CA 000795). The *Citron* action was pending at the time of Kaiser's bankruptcy filing. Eventually, the *Citron* action was removed to federal court and is consolidated with the 1984 LBO proceedings in the United States District Court in the District of Colorado.

with insider transfers made by Petitioners between March 1984 and December 1986, a period after the 1984 LBO during which Petitioners controlled Kaiser. The *Rial* Adversary Proceeding seeks to recover amounts fraudulently conveyed to Petitioners in the form of alleged compensation. The *Frates* Adversary Proceeding seeks to recover assets conveyed to Petitioners in an April 1985 exchange of assets in which Petitioners exchanged worthless coal interests having a negative value for valuable southern California real estate, cash and a note held by Kaiser.

The Honorable Charles E. Matheson, Chief Judge of the United States Bankruptcy Court for the District of Colorado, has presided over Kaiser's reorganization case and the Adversary Proceedings from the outset.

The Kaiser Steel reorganization was successfully completed with confirmation of a Joint Plan of Reorganization ("Joint Plan"). Order dated Oct. 4, 1988; Transcript of September 23, 1988 hearing on confirmation of Joint Plan ("Sept. 23, 1988 Transcript"). No reorganization plan of Kaiser Coal has been filed. The Joint Plan was proposed by Kaiser Steel and its unsecured creditors which consist of four main groups: the Retiree Medical Benefits Trust, the Pension Benefit Guaranty Corporation ("PBGC"), the Retiree Pension Trust and general unsecured claimants. Under the Joint Plan, control and 92% ownership of the reorganized company and its real estate and water rights assets were transferred to these four groups of unsecured creditors. Joint Plan, Art. VI(C). The Retiree Medical Benefits Trust and the PBGC hold the majority of the shares of the reorganized company. The business plan of the reorganized company includes

development of a former mine property as a solid waste disposal facility, a lease and potential sale of valuable southern California water rights, operation of an industrial waste treatment facility, and development of the former Kaiser Steel mill site. *Frates v. Weinshienk*, 882 F.2d 1502, 1504-05 (10th Cir. 1989); Pet. App. 6a; Sept. 23, 1988 Transcript at 30-50. Based on extensive testimony concerning the reorganized company's business plan, the Bankruptcy Court found that the Joint Plan was feasible, that the business plan was likely to succeed, and that the reorganized company was not likely to refile for bankruptcy organization in the future. Sept. 23, 1988 Transcript at 14; Order dated Oct. 4, 1988 at ¶ 14.

The reorganized company does not receive the proceeds, if any, from the litigation other than reimbursement of certain expenses. Joint Plan, Art. I(A)(20),(40); V(D); VI(B)(H). Rather, the unsecured creditors, in addition to the ownership of the stock of the reorganized company, separately were assigned the proceeds from the sale of Kaiser's steel making and steel fabricating assets and the net distributable proceeds, if any, received from the prosecution of litigation and tax refund petitions initiated during the bankruptcy. Joint Plan, Section VI(B) and V(D). The Second Amended Disclosure Statement ("Disclosure Statement"), the Joint Plan and the Bankruptcy Court's findings made clear that there may well be no recovery from any of the litigation commenced during the bankruptcy. As stated in the Disclosure Statement, "if the litigation cases are minimally or not successful, there may be nominal or no Cash Distribution to unsecured creditors. There can be no assurance that any of the Litigation cases will be successful." Disclosure Statement

at 32. The Joint Plan simply provided that Kaiser's unsecured creditors received virtually everything of what was left – all of the assets and businesses of the company and the cash, if any, from tax refunds and litigation proceeds.

In confirming the Joint Plan, Judge Matheson emphasized the completely contingent nature of the litigation and tax refund proceeds, describing them as "the prospects of the extra." Sept. 23 Transcript at 12. The Bankruptcy Court specifically found, based on days of testimony, that the viability of the reorganized company was not dependent upon the successful prosecution of any litigation, including the two Adversary Proceedings. Sept. 23, 1988 Transcript at 14.[2]

The Adversary Proceedings have been actively litigated and are ready for trial. Judge Matheson supervised extensive discovery, held status conferences and considered numerous motions. In June 1988, Judge Matheson set a trial date for March 1989. Following announcement of a trial date and approximately one and one-half years into

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[2] Petitioners' repeated assertion that the reorganized company is dependent on recovery including certain settlements from the Adversary Proceedings (Petition at i, 4, 7, 11) is incorrect, is contrary to the express findings of the Bankruptcy Court, is founded on a misreading of Kaiser's 10-K and Joint Plan, and is belied by the fact that the reorganized company (even though it has actually received less than 40% of the settlement proceeds because of Petitioners' appeals of the Order approving settlements) has not refiled for bankruptcy in the last 14 months notwithstanding Petitioners' dire predictions. Accordingly, the factual predicate for Petitioners' first and third Questions Presented is simply absent.

the litigation, Petitioners moved to recuse Judge Matheson from the Adversary Proceedings. Petitioners did not allege actual bias under 28 U.S.C. §455(b) or 28 U.S.C. §144 and did not file an affidavit of prejudice against Judge Matheson. The motion was based solely upon 28 U.S.C. §455(a) on the theory that a judge cannot adjudicate both a bankruptcy case and related adversary proceedings. Petitioners' Motion for Recusal, dated Nov. 4, 1988. Petitioners coupled their eleventh hour attack on Judge Matheson with other attempts to delay trial, including untimely assertions of jury trial rights, motions to withdraw reference and motions to add various claims and parties.

By bench opinion on December 16, 1988 and order dated December 27, 1988, the Bankruptcy Court denied Petitioners' motions for recusal. Judge Matheson reasoned that the factual basis for the motions was known by Petitioners "from day one" and that his impartiality in the Adversary Proceedings could not reasonably be questioned simply because he sat as the bankruptcy case judge and confirmed a plan of reorganization. Pet. App. at 16a.

Petitioners then sought mandamus relief in the District Court, petitioning for Judge Matheson's recusal and moving the District Court (Hon. Zita Weinshienk) to stay all proceedings. The District Court denied the requested relief in an Order dated February 13, 1989. The Court indicated that it "can find no error" in Judge Matheson's denial of the recusal motions. Pet. App. at 13a. Petitioners also filed motions for leave to appeal in the District Court. In a separate Order, also dated February 13, 1989, Judge Weinshienk denied the motions, stating that "[t]his

court has carefully examined the file and the briefs filed therein and the case law. The Court can find no error in the Bankruptcy Court decisions." Resp. App. at App. 3.

Petitioners then filed a petition for mandamus against Judge Weinshienk and Judge Matheson in the United States Court of Appeals for the Tenth Circuit. In the Tenth Circuit mandamus proceeding, Petitioners asserted additional grounds for Judge Matheson's recusal beyond those argued in the Bankruptcy Court and submitted additional information not presented either to the Bankruptcy Court or to the District Court. Pet. Supp. Brief at 13-20, Pet. Reply Brief at 19, Item 3, Reply Brief Addendum. In addition to arguing that a bankruptcy court cannot adjudicate motions to approve plans of reorganization and preside over related adversary proceedings, Petitioners for the first time urged that various decisions made by Judge Matheson six to twelve months earlier in the reorganization proceedings constituted grounds for recusal. Pet. Supp. Brief at 13-23.

In denying mandamus, the Tenth Circuit analyzed each ruling complained of by Petitioners to determine if the appearance of impartiality might reasonably be questioned. It found that none of Judge Matheson's prior judicial decisions in the reorganization case could reasonably call into question his impartiality. The Tenth Circuit rejected Petitioners' argument that two Tenth Circuit cases antedating the Bankruptcy Reform Act of 1978 automatically required that a judge who approves a plan of reorganization be disqualified from presiding over related adversary proceedings. 882 F.2d at 1504; Pet. App. at 5a. The Tenth Circuit concluded that approval of the Joint Plan and of debtor-in-possession financing did not

create an appearance of partiality. 882 F.2d at 1505; Pet. App. at 7a-8a. The Tenth Circuit also rejected the newly asserted claims that specific rulings of the Bankruptcy Court in uncontested and contested matters could reasonably give rise to any appearance of partiality. 882 F.2d at 1505-06; Pet. App. at 8a-10a.[3]

Petitioners' petition for rehearing and suggestion for rehearing en banc was denied by the Tenth Circuit on October 5, 1989.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE IT IS FACTUAL IN NATURE AND DOES NOT RAISE ANY SUBSTANTIAL QUESTION OF FEDERAL LAW OR PROCEDURE.

Fair review of the Tenth Circuit's opinion demonstrates that its denial of mandamus rests not upon an aberrant standard, as argued by Petitioners, but rather upon the court's careful scrutiny and analysis of the particular facts of this case in light of the well recognized standard under §455(a) of whether a judge's appearance of impartiality may be reasonably questioned on the basis

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[3] A separate motion for recusal brought by Chapter 11 debtor Perma Pacific Properties sought recusal of Judge Matheson from the Perma Pacific Properties bankruptcy case. Perma Pacific Properties did not seek rehearing on Section V of the Tenth Circuit's opinion which dealt with Perma Pacific Properties' motion. Pet. App. at 10a. Perma Pacific Properties did not join in the petition for certiorari and therefore the Perma Pacific issues are not before this Court.

of prior judicial decisions. Dissatisfied with the application of that standard by three courts, Petitioners now seek to embroil this Court in a factual dispute and to have this Court reweigh the bankruptcy judge's prior judicial rulings under a standard well recognized and utilized by this Court, the Tenth Circuit and all other circuits.

In an attempt to inflate the importance of this factual determination, Petitioners suggest review should be granted because, prior to the events involved in these two Adversary Proceedings, Kaiser was involved in an LBO. Petition at 2-3, 13-14. These Adversary Proceedings do not involve an LBO. Rather, in these Adversary Proceedings Kaiser seeks recovery of insider compensation and fraudulently transferred assets taken by Petitioners as owners and managers of Kaiser. Petitioners cite no LBO case in which similar recusal issues have been raised. The only other recent appellate case addressing §455(a) recusal issues in a bankruptcy context did not involve an LBO and reached a conclusion identical to the determination made by the three courts which have already examined Petitioners' contentions. *See In re Manoa Finance Co.*, 781 F.2d 1370 (9th Cir. 1986), *cert. denied sub nom., Yamamoto v. Klenske*, 479 U.S. 1064 (1987).

II. THE TENTH CIRCUIT CORRECTLY DECIDED THAT PETITIONERS WERE NOT ENTITLED TO THE EXTRAORDINARY REMEDY OF MANDAMUS.

The Tenth Circuit found that Petitioners had not established a clear and indisputable right to the

extraordinary relief of mandamus.[4] The Tenth Circuit's denial of mandamus relief was consistent with the reasoning applied by other circuit courts of appeals that have considered interlocutory recusal orders in the context of a mandamus petition. The Second Circuit in *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1314 (2d Cir. 1988), *cert. denied sub nom. Milken v. S.E.C.*, ___ U.S. ___, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989), refused "to invoke an extraordinary remedy which requires showing that the district court indisputably abused its discretion." The Second Circuit distinguished the mandamus petition before it from the Fifth Circuit's recusal order in *Liljeberg v. Health Services Acquisitions Corp.*, 796 F.2d 796 (5th Cir. 1986), *aff'd*, 486 U.S. 847 (1988), because *Liljeberg* went up to the Fifth Circuit on appeal and involved a less rigorous standard of review. *See also In re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (mandamus petition seeking recusal denied because party could not establish a " 'clear and indisputable' right to relief") (*citing Kerr v. United States District Court*, 426 U.S. 394, 403 (1976)).

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[4] The remedy of mandamus "is a drastic one, to be invoked only in extraordinary circumstances." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). "To insure that mandamus remains an extraordinary remedy, Petitioners must carry the burden of showing that [their] right to issuance of the writ is 'clear and indisputable'." *Mallard v. United States District Court*, ___ U.S. ___, 109 S.Ct. 1814, 104 L.Ed.2d 318, 331 (1989) (*citing Bankers Life & Casualty Co. v. Holland*, 349 U.S. 379, 384 (1953)).

III. THE TENTH CIRCUIT'S OPINION IS CONSISTENT WITH PRINCIPLES ARTICULATED BY THIS COURT AND FOLLOWED BY OTHER CIRCUITS FOR DECIDING WHETHER A FEDERAL JUDGE SHOULD RECUSE HIMSELF BASED ON PRIOR JUDICIAL RULINGS.

Disqualification of federal judges is governed by 28 U.S.C. §455, which provides two alternate bases for judicial disqualification: the appearance of partiality, §455(a), and actual bias, §455(b). Petitioners concede they have not sought to disqualify Judge Matheson because of any actual bias.[5] Accordingly, the Tenth Circuit did not address issues of actual bias.[6]

Thus, the only relevant statutory provision is 28 U.S.C. §455(a), as amended in 1974, which calls for recusal when a judge's "impartiality might reasonably be questioned." This Court has explained that §455(a) imposes an objective test of whether a reasonable person would question a judge's impartiality under the circumstances. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Under the objective standard of §455(a), recusal no longer depends upon a subjective evaluation of whether the judge believes he is biased or upon proof of actual bias. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). This objective test "assumes that a reasonable person knows and understands all the relevant facts." *Drexel Burnham*, 861 F.2d at 1313. The appearance

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[5] "No claim of actual bias was made by Petitioners." Petition at 10.

[6] "Here, there is no claim of actual bias." *Frates*, 882 F.2d at 1504; Pet. App. at 6a.

of partiality is not governed by a "straw poll of the only partly informed man-in-the-street." *Id. See also United States v. Murphy*, 768 F.2d 1518, 1537 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (test is whether an "astute" lay or legal observer would reasonably question a judge's impartiality).

Petitioners erroneously claim that the Tenth Circuit ignored the distinction between the actual bias requirements of §455(b) and the reasonable appearance of impartiality standard under §455(a). Petition at 9. The Tenth Circuit emphasized it was not dealing with actual bias and that recusal under §455(a) would be necessary if it "reasonably appears" the judge's impartiality could be questioned when applying an objective standard. *Frates*, 882 F.2d at 1504, Pet. App. 5a. This objective standard is well recognized by the Tenth Circuit. *See, e.g., Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) ("The test is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality").

For the appearance of impartiality to be reasonably questioned on the basis of prior judicial proceedings, prior conduct must suggest, at a minimum, some undue friction, bias or improper prejudgment. *See Ouachita National Bank v. Tosco Corp.*, 686 F.2d 1291, 1301 (8th Cir. 1982) (recusal appropriate "only where the complaining party can point to specific behavior on the part of the judge which reasonably suggests that there has, in fact, been some friction between the judge and the complaining party"); *United States v. Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978) (parties seeking recusal "must be able to point to some behavior on the part of the judge suggesting that there is, in fact, some friction between the

judge and the complaining party"). Under §455(a), a court's rulings against the party are not grounds for recusal. *Willner v. University of Kansas*, 848 F.2d 1032 (10th Cir. 1988); *In re Beard*, 811 F.2d 818, 827 (4th Cir. 1987). "[M]ere disagreement over the state of the law or the correctness of the judge's factual findings will not suffice" to create the appearance of partiality. *In re Cooper*, 821 F.2d at 838.

Both the Tenth Circuit's analysis and conclusions are consistent with the decisions of this Court[7] and all circuit courts[8] in §455(a) recusal cases based on a judge's rulings, statements made and knowledge obtained during the course of prior judicial proceedings. The Tenth Circuit's decision is also in accordance with the only other

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[7] *Meeropol v. Nizer*, 429 U.S. 1337, 1338 n.2 (Marshall, Circuit Justice 1977) (Supreme Court Justice not disqualified from hearing litigant's appeal when he was member of Second Circuit panel which earlier denied post-conviction relief to co-defendants of litigant's parents). *See generally United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (recusal not required under 28 U.S.C. §144 based on prior judicial rulings and conduct).

[8] *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1301 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 75, 102 L.Ed.2d 51 (1988) (no appearance of partiality arose from judge's prior discovery rulings in same case); *In re Cooper*, 821 F.2d 833, 838 (1st Cir. 1987) (no appearance of partiality based on findings and tone of opinion denying motion to dismiss an indictment); *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986) (no appearance of partiality stemming from judge's *ex parte* contact with one party designed to promote settlement); *Demjanjuk v. Petrovsky*, 776 F.2d 571, 577 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986) (no appearance of partiality in extradition hearing based on judge's earlier participation in denaturalization

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appellate court decision addressing the specific question of recusal under §455(a) of a bankruptcy judge who presides over the Chapter 11 reorganization case and related adversary proceedings. *See In re Manoa Finance*, 781 F.2d at 1373 (recusal not necessary from adversary proceedings even though information obtained during reorganization proceedings led judge to characterize a loan

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hearing); *United States v. Parker*, 742 F.2d 127, 128 (4th Cir.), *cert. denied*, 469 U.S. 1076 (1984) (no appearance of partiality where judge presided over perjury trial and had earlier denied motion to suppress the evidence forming the basis for perjury allegations); *United States v. Nelson*, 718 F.2d 315, 321 (9th Cir. 1983) (no appearance of partiality based on judge's earlier adverse rulings in same case, even if rulings erroneous); *Ouachita National Bank v. Tosco Corp.*, 686 F.2d 1291, 1299-1301 (8th Cir. 1982) (no appearance of partiality in retrial where same judge had ruled in earlier trial on witness credibility, substantive issues, and remittitur of damages); *United States v. Coven*, 662 F.2d 162, 168-69 (2d Cir. 1981), *cert. denied*, 456 U.S. 916 (1982) (no appearance of partiality in criminal trial based on judge's presiding at prior civil attachment proceeding which led to criminal charges); *United States v. Cepeda Penes*, 577 F.2d 754, 758 (1st Cir. 1978) (no appearance of partiality in criminal prosecution although judge presided when defendant entered a *nolo contendere* plea and the judge commented that this plea was substantially similar to a guilty plea); *In re Corrugated Container Antitrust Litigation*, 614 F.2d 958, 965 (5th Cir.), *cert. denied*, 449 U.S. 888 (1980) (no appearance of partiality in civil antitrust litigation based on judge presiding at prior criminal trial involving defendant); *United States v. Mitchell*, 377 F. Supp. 1312 (D.D.C. 1974), *aff'd sub nom. United States v. Haldeman*, 559 F.2d 31, 129-39 n. 297 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (recusal of Judge Sirica not required under an appearance of impartiality standard even though he presided over Watergate grand jury and trial of Gordon Liddy and others).

arrangement as "ridiculous" and to hint of possible embezzlement charges).

Petitioners criticize the Tenth Circuit for not specifically citing *Liljeberg* (a factually inapposite case involving a judge's extrajudicial board position), but a review of the Tenth Circuit's opinion demonstrates that it applied the *Liljeberg* objective standard. First, the Tenth Circuit examined whether the appearance of impartiality could reasonably be questioned because of Judge Matheson's order approving Kaiser Steel's Joint Plan. While the Joint Plan provided, as it must, for distribution of the proceeds, if any, received from the Adversary Proceedings and other litigation, the Disclosure Statement and the Bankruptcy Court's order made it clear that there is no guarantee of any recovery from the Adversary Proceedings. Moreover, Kaiser's unsecured creditors received virtually all of the stock of the reorganized company and could expect a return through the long term business plans of the reorganized company which the Bankruptcy Court found are not dependent on recovery in the Adversary Proceedings or other litigation. 882 F.2d at 1504-05; Pet. App. at 6a-7a.

Second, the Tenth Circuit properly rejected the contention that the Bankruptcy Court's approval of debtor-in-possession financing reasonably raised a question of partiality. Bankruptcy courts in almost every case approve post-petition, debtor-in-possession financing which is used for all purposes including litigation. As noted by the Tenth Circuit, this post-petition financing came from the PBGC, which asserted claims in excess of $200 million and was a 28% owner of the reorganized Kaiser under the Joint Plan. 882 F.2d at 1505; Pet. App. 7a-8a. PBGC repeatedly informed the Bankruptcy Court

that it would seek to prosecute the litigation at its own expense if the debtor did not pursue the litigation. Sept. 23, 1988 Transcript at 7-8. The PBGC loan approval order addressed a challenge to PBGC's corporate authority to make loans, not the merits of any litigation. *Id.* The Tenth Circuit found that the prosecution of litigation, including the two Adversary Proceedings, was not contingent upon this post-petition financing, and held that approval of PBGC's loan did not create an appearance of partiality. 822 F.2d at 1505; Pet. App. at 8a.

Finally, the Tenth Circuit rejected Petitioners' claim that the appearance of Judge Matheson's partiality could reasonably be questioned because of his prior rulings on various contested and uncontested motions unrelated to the Adversary Proceedings. 882 F.2d at 1505-06; Pet. App. at 8a-10a.

The Tenth Circuit utilized an objective approach in determining whether Judge Matheson's partiality might reasonably be questioned by a person who knows and understands all of the surrounding facts. This is precisely the sort of analysis mandated by §455(a), this Court's opinion in *Liljeberg*, the Tenth Circuit (*Hinman v. Rogers, supra*), and by all other courts of appeals (*see* discussion *supra* at 13-14). Further, the Tenth Circuit's disposition of Petitioners' allegation of the appearance of partiality is consistent with the Ninth Circuit's *Manoa Finance* case – the only other recent appellate decision to address a similar §455(a) issue in a bankruptcy context.

IV. THE TENTH CIRCUIT PROPERLY CONSIDERED THE INFORMATION SUBMITTED BY PETITIONERS IN THE MANDAMUS PROCEEDING.

The Tenth Circuit conducted an original mandamus proceeding pursuant to 28 U.S.C. §1651. *See Cotler v. Inter-County Orthopaedic Assn.*, 530 F.2d 536, 538 (3rd Cir. 1976) (exercise of mandamus jurisdiction is original action at law); *Arizona v. United States District Court*, 709 F.2d 521, 523 (9th Cir. 1983) ("under the All Writs Act, 28 U.S.C. §1651, mandamus is an original action at law"). In support of its petition for writ of mandamus, Petitioners submitted to the Tenth Circuit the report filed by the reorganized company with the SEC on March 31, 1989. Petitioners asked the Tenth Circuit to consider information in the reorganized Kaiser Steel's 10-K concerning the proceeds of various settlements. Reply Brief of Petitioners, dated May 1, 1989 at 19-21.

Petitioners now complain that the Tenth Circuit erred by considering the document which Petitioners – not Kaiser – submitted. Petition at 7, 10-13. Even if consideration of this document was error (which it was not), it was caused solely by Petitioners, who are estopped from claiming error in the Tenth Circuit's consideration of information which they submitted. Further, Petitioners have failed to show that consideration of the information was in fact error or was material to the Tenth Circuit's denial of mandamus. No matter how much the Petitioners attempt to embellish the Tenth Circuit's comments about Kaiser's receipt of settlement amounts, the Tenth Circuit's opinion clearly states that the information merely provides additional support for the basic conclusion that the Joint Plan and PBGC loan orders did not

raise any reasonable concern about the court's impartiality. 882 F.2d at 1505; Pet. App. at 8a.

Further, Petitioners state that the Tenth Circuit "placed itself in conflict" with *Liljeberg* and a line of decisions in other circuits which Petitioners claim "uniformly recognized that the proper time frame for consideration of relevant facts is when the trial court is presented with a motion for recusal." Petition at 13. Petitioners cite thirteen cases allegedly supporting this proposition, but tellingly omit citation to any particular page in any of the cases. In fact, *none* of the thirteen cases cited by Petitioners address time limitations on a court of appeals' receipt of information in a §1651 mandamus proceeding. The case law is devoid of any authority prohibiting a court in a mandamus proceeding from considering a complete, current set of facts to determine if the appearance of impartiality may reasonably be questioned. The Tenth Circuit properly considered all materials submitted in the mandamus proceeding, including the information presented by Petitioners.

CONCLUSION

For the above-stated reasons, the petition for a writ of certiorari should be denied.

February 1990.

Respectfully submitted,

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Kaiser Coal Corporation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
FILED FEB 13 1989

Civil Action No. 89-Z-50

Bankruptcy Case NO. 87 B 1552 E

Adversary Proceeding No. 87 E 135

In re:

KAISER STEEL CORPORATION,

Debtor.

KAISER STEEL CORPORATION

Plaintiff-Appellee,

v.

JOSEPH A. FRATES, CHARLES S. HOLMES, ROBERT E. MERRICK, EQUIVEST ASSOCIATES, a partnership, STAN P. DOYLE, CLIFFORD V. BROKAW III, J. ANTHONY FRATES, P. PETER PRUDDEN III, STEPHEN I. FRATES, MONTY H. RIAL, CHARLES S. McNEIL, DR. EUSTACE H. WINN, JR., WILLIAM R. GOULD, HOWARD P. ALLEN, CHARLES H. BLACK, STEPHEN A. GIRARD, RICHARD N. GARY, LLOYD G. HANSEN, DONALDSON, LUFKIN & JENRETTE, ESTATE OF HOWARD J. SAMUELS, STATE FEDERAL SAVING & LOAN ASSOCIATION, a federally chartered stock company, SIERRA GATEWAY DEVELOPMENT, INC., PERMA/FRAES, a joint venture, DEAN WITTER REYNOLDS, INC., a Delaware corporation,

Defendants.

PERMA RESOURCES CORPORATION, a Colorado corporation, PERMA MINING CORPORATION, a Colorado

corporation, PERMA PACIFIC, INC., a Delaware corporation, PERMA PACIFIC PROPERTIES, an Oklahoma general partnership, CALDER & COMPANY, a Colorado limited partnership, CHIMNEY ROCK COAL, a New Mexico limited partnership, ENERGY CAPITAL LTD., a/k/a COLORADO PACIFIC ENERGY, a Colorado limited partnership, AZTEC, LTD., a/k/a COLORADO PACIFIC AZTEC, a Colorado Limited Partnership, and COLORADO COAL MINING COMPANY, a Colorado limited partnership,

Defendants-Appellants.

KAISER STEEL CORPORATION and KAISER COAL CORPORATION,

Plaintiffs-Appellees.

v.

MONTY H. RIAL, CHARLES S. McNEIL, DR. EUSTACE H. WINN, JR., MILES G. YEAGLEY, JOSEPH A. FRATES, CHARLES S. HOLMES, DOYLE & HOLMES, an Oklahoma general partnership or professional association, ROBERT E. MERRICK, EQUIVEST ASSOCIATES, a partnership, STAN P. DOYLE, J. ANTHONY FRATES, P. PETER PRUDDEN III, STEPHEN I. FRATES, JOHN L. FARRELL, JR., EQUIVEST MANAGEMENT AND FINANCIAL SERVICES, LTD., ASSET MANAGEMENT, INC., WILLIAM R. GOULD, HOWARD P. ALLEN, CHARLES H. BLACK, STEPHEN A. GIRARD, RICHARD N. GARY and LLOYD G. HANSEN,

Defendants.

PERMA RESOURCES CORPORATION, a Colorado corporation, PERMA MINING CORPORATION, a Colorado

corporation, PERMA PACIFIC, INC., a Delaware corporation, F.C.D. OIL CORPORATION, an Oklahoma corporation, WINRIA MANAGEMENT SERVICES, a partnership, COLORADO COAL RESOURCES COMPANY, a Colorado united partnership, AZTEC LTD., a/k/a COLORADO PACIFIC AZTEC, a Colorado limited partnership, ENERGY CAPITAL, LTD., a/k/a COLORADO PACIFIC ENERGY, a Colorado limited partnership, CHIMNEY ROCK COAL, a New Mexico limited partnership,

Defendants.

In re:

PERMA PACIFIC PROPERTIES,

Debtor-In-Possession,

Appellant.

ORDER

The motions before the Court are defendants-appellants' Motion For Certification, Motion For Leave To Appeal, Motion To Consolidate and Motion For Stay Pending Appeal.

This Court has carefully examined the file and the briefs filed therein and the case law. The Court can find no error in the Bankruptcy Court decisions.

Furthermore, it does not appear that the orders below involve a controlling question of law as to which there is substantial ground for difference of opinion, nor

that an immediate appeal may materially advance the ultimate termination of the litigation. Therefore, it is

ORDERED that the Motion For Certification and Motion For Leave To Appeal are denied. It is

FURTHER ORDERED that the Motion To Consolidate is denied. It is

FURTHER ORDERED that the Motion For Stay Pending Appeal is denied. It is

FURTHER ORDERED that this bankruptcy appeal is dismissed.

DATED at Denver, Colorado, this 13th day of February, 1989.

BY THE COURT:

/s/ Zita L. Weinshienk
ZITA L. WEINSHIENK, Judge
United States District Court